STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2009
v	No. 283951 Saginaw Circuit Court
CHARLES LEQUETTE HILL, Defendant-Appellant.	LC No. 07-028679-FH

Before: Fort Hood, P.J., and Cavanagh and K.F. Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), domestic violence, third offense, MCL 750.81(4), resisting or obstructing a police officer, MCL 750.81d(1), and malicious destruction of police property, MCL 750.337b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to twenty to thirty years' imprisonment for the home invasion conviction, and thirty-four months to fifteen years' imprisonment for the remaining convictions. Defendant appeals as of right, and we affirm.

Defendant first alleges that he was deprived of his right to an impartial judge when the judge's brother acted as the prosecutor in the district court proceeding. We disagree. This Court reviews the chief judge's decision regarding a motion for disqualification, MCR 2.003, for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). We defer to the factual findings and conclusions rendered by the chief judge and the trial judge regarding issues of judicial disqualification. *Id*. Although factual findings on a motion for disqualification are reviewed for an abuse of discretion, the application of the facts to the law is reviewed de novo. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A party seeking disqualification must overcome a heavy presumption of judicial impartiality. *Id*. Specifically, it must be proven that the judge harbors both personal and extrajudicial bias or prejudice against a party or the party's attorney. *Cain, supra* at 495-496.

The court rules provide that a judge is disqualified when the case cannot be impartially heard, including the circumstance where a person within the third degree of relationship to the judge is "a party to the proceeding" or "acting as a lawyer in the proceeding." MCR 2.003(B)(6)(a), (b). "Proceeding" is defined as "a particular action, or course or manner of action." Random House Webster's College Dictionary (2000), p 1054. Although the trial judge's brother served as the prosecuting attorney at the preliminary examination, the brother did not serve as the prosecutor at the circuit court level. Thus, the trial court's brother did not act as

a lawyer in the circuit court proceeding. Moreover, defendant did not raise any issues pertaining to the preliminary examination or the district court proceedings. The trial judge was never asked to review the proofs presented in the lower court.[1] Furthermore, the trial judge did not act as the trier of fact, but rather, the charges were presented to the jury. Unless a prosecuting attorney personally appears in a proceeding, he is not a representative of a party. *People v Dycus*, 70 Mich App 734, 376; 246 NW2d 326 (1976). Also, defendant did not comply with the time for filing the motion, MCR 2.003(C)(1), did not include an affidavit with the motion, MCR 2.003(C)(2), and did not cite any authority in support of the motion. In light of the above, defendant failed to overcome the presumption of judicial impartiality and failed to demonstrate that the court rules required disqualification.

Defendant next asserts that the trial court erred in refusing to assist in obtaining decent clothing for him to wear at trial. This issue is not preserved for appellate review. After defendant's request to "strike the jury" was denied because of his wristband, defendant protested the fact that he was wearing clothes at trial that he wore at the time of arrest. Defendant alleged that the clothes were ripped. When the trial court inquired further, defendant pointed out that buttons were missing. The trial court denied the "complaint," noting that it was the third day of trial and defendant was not wearing jail clothes. Counsel for defendant then noted that family members and jail officials were aware of the problem, but new clothing was not produced. When this issue was raised in a motion for new trial, the trial court denied the motion, noting that defendant had ample time to obtain clean clothes.

Unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Reversal is only warranted when plain error resulted in the conviction of an actually innocent defendant or the fairness, integrity or public reputation of the judicial proceedings was seriously affected. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The trial court's decision regarding proper attire is reviewed for an abuse of discretion. *People v Lewis*, 160 Mich App 20, 30; 408 NW2d 94 (1987). A defendant is entitled to wear civilian clothing rather than prison clothes. *Id*. A due process violation arising from defendant's clothing occurs if it "impair[s] the presumption of innocence." *Id*. at 31.

[1] On appeal, defendant contends that disqualification was required because of an error committed by the judge's brother. In district court, the prosecutor requested an amendment to the information to add a charge of malicious destruction of police property. Following the presentation of evidence, the trial court found that there was sufficient evidence to support the charge and granted the bindover on that charge. On the first day of trial, the circuit court prosecutor noted that an amended information had not been filed to reflect the malicious destruction charge and moved for admission of an amended information. An oral amendment to an information is sufficient, and prejudicial error does not occur as a result of the failure to reduce the amendment to a writing. *People v Holibaugh*, 38 Mich App 198, 199; 195 NW2d 881 (1972); see also MCL 767.76. Moreover, there is no record evidence that the district court prosecutor was responsible for filing an amended information in circuit court. Therefore, this challenge is without merit.

In the present case, there was no formal motion before the trial court to request assistance in obtaining different civilian clothing. Rather, during the third day of trial, defendant raised this complaint when his request to "strike" the jury was denied. We have no record evidence of the clothing defendant wore at trial. Therefore, we cannot determine whether the clothing worn at trial had any impact. Defendant failed to demonstrate plain error, and therefore, he is not entitled to appellate relief. *Carines, supra*.

Defendant contends that trial counsel was ineffective for admitting that defendant went to the victim's home, refusing to pursue medical evidence to substantiate the defense of resisting and obstructing, and failing to call an alibi witness. We disagree. The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). To overcome this presumption, the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and that the deficiency was so prejudicial that, but for the unprofessional errors, the outcome of the trial would have been different. *Id*.

In the opening statement, defense counsel stated that defendant was "over there." On appeal, defendant contends that the "over there" reference was to the victim's home, and the reference constituted an admission that negated his defense that he did not enter the home and assault the victim. Review of the opening statement reveals that defense counsel spoke of the victim and defendant's mother, and therefore, it is unclear to whom the "over there" reference was directed. Further, defense counsel did not relate the "over there" comment to a particular time and date. However, after commenting that he was mixing up his words, defense counsel expressly stated, "[Defendant] denies going over to [the victim's] house. That's the most important thing." Defense counsel further denied that defendant caused the victim's injuries. The argument, when reviewed in context, did not negate a defense or admit an element of the charged crimes. See *People v Freeman*, 240 Mich App 235, 237; 612 NW2d 824 (2000). This claim of error is without merit.

We conclude that the ineffective assistance challenge regarding medical records is also without merit. Defendant alleged that his medical records presented a defense to the charge of resisting and obstructing. However, in the record below and on appeal, defendant fails to present any authority to indicate that the alleged use of excessive force by police is a valid defense to resisting and obstructing. Furthermore, the trial court granted defense counsel's request to review the medical records. After examining the medical records provided by the nurse, defense counsel represented that the documents did not provide relevant information. In the trial court, defendant disagreed with his counsel and asserted that there was a distinction between medical records and intake records, and the nurse allegedly did not present all of the necessary documents to the court. On appeal, defendant presents this same argument. However, there is no record evidence to support the distinction and the conclusion that records are missing. We are bound by the facts developed in the lower court record, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), and defendant failed to move for expansion of the record on appeal with proofs to demonstrate that this issue has merit. Accordingly, defendant is not entitled to relief.

Defendant further asserts that trial counsel was ineffective for failing to call an alibi witness, Jerrell Jones. At the *Ginther*[2] hearing, trial counsel testified that defendant advised him of his alibi witness. However, defendant reported that he was out with Jones at the Cadillac Club, but he was dropped off *before* the criminal activity took place. Based on this conversation, trial counsel could not present an alibi defense and explained this to defendant.

Although defendant did not testify at trial, he testified at the *Ginther* hearing. During direct examination by counsel, defendant asserted that he provided the name of his alibi witness and contact information to trial counsel. Despite being given this information, trial counsel did not contact the alibi witness and did not file a notice of alibi on his behalf. In fact, defendant raised the issue of an alibi defense with counsel on two or three occasions. During cross-examination, defendant testified that Jones visited him in jail before trial. However, during the visits, defendant never mentioned that he wanted Jones to be a witness a trial. Defendant acknowledged that this information was a "little bit" inconsistent with his insistence that trial counsel call Jones as a witness at trial. Furthermore, defendant did not contact Jones to appear at the *Ginther* hearing. Defendant did not know Jones' telephone number or his two-way number, but he did have Jones' address. Nonetheless, despite contact by defendant's appellate counsel, Jones did not appear at the *Ginther* hearing.

The trial court held that the failure to call Jones as a witness was a deliberate strategic decision based on counsel's belief that Jones could not provide a feasible alibi. We cannot conclude that the trial court's factual finding was clearly erroneous. *LeBlanc*, *supra*. The witnesses to be called at trial presents a strategic decision by counsel for which this Court will not substitute its judgment. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). In light of the failure to refute defendant's admission to trial counsel that his alibi witness dropped him off before the crime was committed, trial counsel was not ineffective for failing to call Jones as a witness.

In a supplemental brief, defendant asserts that the trial court erred in relying upon an unconvicted offense for purposes of scoring offense variable (OV) 13. Review of the sentencing hearing reveals that there was no objection to the scoring of OV 13. Because defendant did not comply with the provisions of MCL 769.34(10), this issue is not preserved for appellate review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Furthermore, defendant's challenge to factors underlying his sentence was rejected in *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).